FILED BY CLERK
MAR 23 2010
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. KAJORNSAK PRASERTPHONG, Petitioner.	2 CA-CR 2009-0386-PR DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-64663

Honorable Jan E. Kearney, Judge

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney
By Jacob R. Lines
Tucson
Attorneys for Respondent

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Attorney for Petitioner

H O W A R D, Chief Judge.

¶1 Following a jury trial, petitioner Kajornsak Prasertphong was convicted of three counts of first-degree felony murder and three counts of armed robbery. After multiple appeals, he sought relief from the trial court pursuant to Rule 32, Ariz. R. Crim. P., raising numerous claims. The trial court denied his petition for post-conviction relief, and this petition for review followed.

¶2 Prasertphong first argues the trial court erred in denying his petition because the jury had been provided a flawed instruction on premeditation and also because his appellate counsel had been ineffective by not raising the erroneous jury instruction on appeal. We will not disturb a trial court's grant or denial of post-conviction relief absent a clear abuse of the court's discretion. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). In denying relief, the trial court clearly identified these issues and resolved them correctly in a thorough, well-reasoned minute entry, and we adopt its ruling on these two claims. *See State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993) (when trial court has correctly ruled on issues raised "in a fashion that will allow any court in the future to understand the resolution[, n]o useful purpose would be served by this court[']s] rehashing the trial court's correct ruling in a written decision").

¶3 Prasertphong next contends his trial counsel had provided ineffective assistance at his re-sentencing hearing for two reasons: 1) counsel had presented mitigating evidence in written form only and 2) he had made a "derogatory" comment at

sentencing. To present a colorable claim of ineffective assistance of counsel, a defendant must show that counsel's performance was deficient under prevailing professional norms and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Nash*, 143 Ariz. 392, 397, 694 P.2d 222, 227 (1985). "A colorable claim of post-conviction relief is 'one that, if the allegations are true, might have changed the outcome." *State v. Jackson*, 209 Ariz. 13, ¶ 2, 97 P.3d 113, 114 (App. 2004), *quoting State v. Runningeagle*, 176 Ariz. 59, 63, 859 P.2d 169, 173 (1993). And if a defendant fails to make a sufficient showing on either element of the *Strickland* test, the court need not determine whether the other element was satisfied. *State v. Salazar*, 146 Ariz. 540, 541, 707 P.2d 944, 945 (1985).

¶4 Trial counsel is presumed to have acted properly unless a petitioner can show that counsel's conduct was not the result of reasoned tactical decisions, "but, rather, revealed ineptitude, inexperience or lack of preparation." *State v. Goswick*, 142 Ariz. 582, 586, 691 P.2d 673, 677 (1984); *State v. Hershberger*, 180 Ariz. 495, 497, 885 P.2d 183, 185 (App. 1994). Generally, "[m]atters of trial strategy and tactics are committed to defense counsel's judgment" and cannot serve as the basis for a claim of ineffective assistance of counsel. *State v. Beaty*, 158 Ariz. 232, 250, 762 P.2d 519, 537 (1988). Counsel's decisions need only have had some reasoned basis, *State v. Vickers*, 180 Ariz. 521, 526, 885 P.2d 1086, 1091 (1994), and will not be evaluated by a reviewing court "in the harsh light of hindsight," *State v. Pacheco*, 121 Ariz. 88, 91, 588 P.2d 830, 833 (1978).

¶5 The trial court found that counsel's decision to present only written mitigation evidence was strategic and that Prasertphong's assumption that live testimony would have been more persuasive ignored the possibility of prejudice on cross-examination. Prasertphong argues again on review that live testimony would have been more persuasive, but he fails to meaningfully undermine the trial court's conclusion that counsel's strategic decision not to present live testimony had a reasoned basis or to show that it fell below prevailing professional norms.

¶6 Prasertphong cites *Wiggins v. Smith*, 539 U.S. 510 (2003), to support his assertion that counsel's decision was deficient and prejudicial. In *Wiggins*, the Court held that an attorney's failure to thoroughly investigate and present mitigating factors for sentencing could not be justified as trial strategy. 539 U.S. at 521-22. *Wiggins* did not address whether presenting written evidence fell below professional norms. *See id.* Additionally, although Prasertphong briefly contends that his counsel had only "a rudimentary knowledge of [his] history from a narrow set of sources," he does not assert that there was specific, relevant mitigating evidence that counsel failed to discover and present to the court. Indeed, as Prasertphong acknowledges, his counsel presented considerable mitigating evidence at the re-sentencing hearing, including transcripts of testimony by defense witnesses from the original sentencing hearing, multiple doctors' reports, and school and health records. *Wiggins*, therefore, is not helpful to Prasertphong.

¶7 Prasertphong has not shown trial counsel's performance fell below the prevailing norm. Accordingly, we need not examine whether the performance prejudiced

him. *See Salazar*, 146 Ariz. at 541, 707 P.2d at 945. We conclude that the trial court did not abuse its discretion in denying relief based on counsel's presentation of the written mitigating evidence. *See Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d at 948.

¶8 Counsel made the comment that Prasertphong claims was derogatory at the re-sentencing hearing, stating:

> For the 35 years I have practiced law, Your Honor, I have always believed that an individual, no matter how depraved, is entitled to have his rights protected and to have all of the information that is helpful to him presented to a sentencing court.
>
> I have attempted to do that in this case in the short time that I have had it, and I don't think that the Court needs further advice from me as to what to do.

Prasertphong asserts this statement indicated counsel's belief that Prasertphong was depraved and "affirm[ed] the previous statements made by the family members of the victims [in favor of] an aggravated sentence." But viewed in light of counsel's entire argument, we do not find the use of the word "depraved" was prejudicial. As the trial court stated in denying Prasertphong's petition for post-conviction relief, "[t]here is no hint that the comments of defense counsel had any negative effect whatsoever." Thus, the court did not abuse its discretion by denying Prasertphong's claim of ineffective assistance of counsel based on the use of the word "depraved." *See id.*

¶9 Finally, Prasertphong contends he is entitled to relief because the trial court denied his request for the transcripts of his co-defendant's trial. He claims that, without these transcripts, he was denied the possibility of raising a due process violation "based

on the State [having presented] fundamentally inconsistent prosecution theories during the two trials."[1]

¶10 In a Rule 32 proceeding, a trial court may compel discovery, with good cause shown, after a defendant has filed a petition for post-conviction relief. *Canion v. Cole*, 210 Ariz. 598, ¶ 10, 115 P.3d 1261, 1263 (2005). A claim that the discovery is "needed to present an effective defense" is insufficient unless supported by a proper Rule 32 petition. *Id.* ¶ 17.

¶11 Prasertphong filed a motion requesting the transcripts before he had submitted his petition for post-conviction relief, but he renewed his request both in the petition itself and also in his reply to the state's arguments. Having already ruled on the motion prior to the filing of Prasertphong's petition, the trial court reiterated its earlier ruling, finding that Prasertphong had neither described any allegedly inconsistent theories nor stated his basis for believing that inconsistencies exist. In essence, the court concluded that Prasertphong had not shown good cause for compelling production of the transcripts, especially in light of the significant burden the production would impose on the state. And because Prasertphong has not provided any information that would show

[1]Prasertphong also states that "other potential claims may exist, such as a violation of [his] Sixth Amendment rights under the United States Constitution with respect to the Confrontation Clause." However, these claims would not only be waived, as they were not presented to the trial court, *see State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980), but the Sixth Amendment claim is also precluded under Rule 32.2(a) because it was "[f]inally adjudicated on the merits." *See Prasertphong v. Arizona*, 541 U.S. 1039, 1039 (2004); *State v. Prasertphong*, 210 Ariz. 496, ¶ 3, 114 P.3d 828, 829 (2005); *State v. Prasertphong*, 206 Ariz. 70, ¶¶ 30-39, 75 P.3d 675, 685-87 (2003).

the trial court abused its discretion by finding he had not shown good cause and denying his request, we find no error. *See Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d at 948.

¶12 Finding no abuse of the trial court's discretion in denying Prasertphong's petition for post-conviction relief, we grant review but deny relief.

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Presiding Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge